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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 ROBERT BRUCE MCKAY-ERSKINE,

10 Petitioner,

11 v.

12 JEFFREY UTTECHT,

13 Respondent.

CASE NO. 3:18-cv-05024-BHS-TLF

ORDER TO SHOW CAUSE

14 The District Court has referred this habeas corpus petition filed pursuant to 28 U.S.C. §
15 2254 to United States Magistrate Judge Theresa L. Fricke. Petitioner Robert Bruce McKay-
16 Erskine seeks relief from a state court conviction. *See* Dkt. 8. In the petition, Mr. McKay-
17 Erskine raises ineffective assistance of counsel as grounds for habeas corpus relief.

18 A federal habeas corpus petitioner is required to exhaust state remedies before filing a
19 habeas corpus petition in federal court. 28 U.S.C. § 2254(b)(1)(A). To exhaust state remedies,
20 the petitioner must fully and fairly present to the highest court available in the state, claims
21 regarding the same legal and factual issues that are later brought in the federal habeas corpus
22 petition. *Davis v. Silva*, 511 F.3d 1005, 1009 (9th Cir. 2008). It is not enough for the petitioner to
23 present the claims to a lower state court, then appeal some but not all claims to the highest

1 available court of the state; the petitioner's appeal to the highest available state court must
2 specifically include all the operative legal and factual bases for the federal claim that is later
3 raised in the federal habeas corpus claim. *Baldwin v. Reese*, 541 U.S. 27, 31-32 (2004); *Davis*,
4 511 F.3d at 1008-09. It is incumbent upon the federal court to review documents that constitute
5 the petitioner's litigation of the appeal to the highest available state court, to determine what
6 claims were presented to that court by the petitioner and whether the requirement of exhaustion
7 of state remedies has been satisfied. *Kim v. Villalobos*, 799 F.2d 1317, 1320 (9th Cir. 1986).

8 In denying McKay-Erskine's personal restraint petition, the Washington State Court of
9 Appeals held:

10 While McKay-Erskine's counsel cancelled a December 2012 bail hearing, he set a
11 bail hearing for March 22, 2013. McKay-Erskine does not show deficient
12 performance in postponing the bail hearing. McKay-Erskine fails to show that his
13 counsel did not keep him adequately informed. His counsel met with him a
14 number of times and provided him with the State's discovery two weeks before
15 trial. McKay-Erskine fails to show that expert medical testimony would have been
16 relevant in his trial. There were no incriminating medical findings in the State's
17 case. McKay-Erskine does not show that his counsel's cross-examination of the
18 State's witness was deficient. The evidence of past drug use by some of the
19 witnesses was not admissible as impeachment evidence. And his counsel elicited
20 testimony establishing possible bias of one of the State's witnesses, LaVergne.
[VRP at 12-13.] McKay-Erskine does not show that his counsel's decision not to
21 call all of the witnesses on his witness list was deficient performance. Finally, he
22 does not show that his counsel prohibited him from testifying in his own defense;
23 his counsel properly advised him of the dangers of testifying in his own defense.
Thus, McKay-Erskine does not demonstrate deficient performance by his trial
counsel. And even if he had, he does not show a reasonable probability the result
of his trial would have been different had that deficient performance not occurred.
McKay-Erskine fails to demonstrate ineffective assistance of counsel.

20 Dkt. 12, Respondent's Submission of Relevant State Court Record, Exhibit 14, p. 2.

21 McKay-Erskine raises the same grounds in his federal habeas corpus petition. *See* Dkt. 8,
22 Petition for Habeas Corpus, at 3, 5-7. The petitioner alleges that he exhausted state remedies with
23 respect to all of his ineffective assistance of counsel claims. *Id.* at 6-7. Yet this Court does not

1 have documentation showing the specific legal and factual grounds that were raised in the
2 petitioner's litigation of the appeal (by a motion for discretionary review) to the Washington
3 Supreme Court from the Court of Appeals PRP decision.

4 Respondent's brief states, "The file received from the Washington Supreme Court did not
5 contain a copy of the motion for discretionary review. Respondent will try to obtain a copy of the
6 pleading and submit it to the Court and to McKay-Erskine." Dkt. 11, p. 4, n.2. Respondent so far
7 has not submitted a copy of McKay-Erskine's motion for discretionary review.

8 The Washington Supreme Court's decision denying petitioner's motion for discretionary
9 review, Dkt. 12, Ex. 15, does not identify all of the specific factual bases raised in the motion for
10 discretionary review for the ineffective assistance of counsel claim. The Commissioner's ruling
11 discusses the expert witness issue. *Id.* at p. 2. But the Washington Supreme Court denied the
12 motion for discretionary review on the legal claim of ineffective assistance of counsel without
13 discussing the other factual bases raised in his personal restraint petition to the Washington Court
14 of Appeals.

15 The Court notes that, without additional documentation of the Washington Supreme
16 Court litigation concerning the petitioner's motion for discretionary review, the Court cannot
17 independently confirm whether McKay-Erskine satisfied the exhaustion requirement with
18 respect to all the factual bases of his ineffective assistance of counsel claim (other than the claim
19 that his counsel should have hired an expert witness). *Kim*, 799 F.2d at 1320.

20 In the section of respondent's answering brief addressing exhaustion as to each legal and
21 factual foundation of petitioner's ineffective assistance of counsel claim, respondent states,
22 "McKay-Erskine *appears to have properly exhausted his state court remedies* by fairly
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1 presenting his one claim to the Washington Supreme Court as a federal claim.” Dkt. 11, p. 5
2 (emphasis added).

3 To waive exhaustion of state remedies or to be estopped from relying on it, there is a
4 statutory directive that the respondent must expressly waive the exhaustion requirement. 28
5 U.S.C. § 2254(b)(3); *see generally Roberts v. Howton*, 13 F. Supp. 3d 1077, 1105-06 (D. Or.
6 2014) (holding that respondent explicitly waived exhaustion, “and/or” there was no available
7 state court remedy remaining, where respondent wrote, “[i]t does not appear that petitioner has
8 any of the usual or normal remaining state remedies on the issues she raises in this habeas corpus
9 proceeding”).

10 Accordingly, by **September 19, 2018**, respondent is directed to locate and file additional
11 litigation documents concerning McKay-Erskine’s motion for discretionary review of the denial
12 of his personal restraint petition, and also show cause in accordance with 28 U.S.C. §
13 2254(b)(1)(A), and 28 U.S.C. § 2254(b)(3) why McKay-Erskine’s ineffective assistance of
14 counsel claim either has, or has not been fully and fairly exhausted. If these Washington
15 Supreme Court motion for discretionary review litigation documents cannot be located and filed,
16 then the respondent should clarify whether the State is explicitly waiving the exhaustion
17 requirement based on the current record. If the respondent does not clarify whether it explicitly
18 waives the exhaustion requirement, then Court will take additional steps as necessary.

19 Dated this 5th day of September, 2018.

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Theresa L. Fricke
23 United States Magistrate Judge